Filed 9/29/09 P. v. Hall CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STACY HALL, Defendant and Appellant.	H032356 (Santa Clara County Super. Ct. No. FF615927)

Defendant Stacy Hall was convicted in a jury trial of one felony count of unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)), one felony count of receiving or concealing stolen property (Pen. Code, § 496, subd. (d)),[1] one misdemeanor count of giving a false name to a peace officer (§ 148.9), and one misdemeanor count of driving without a license (Veh. Code, § 12500, subd. (a)). The information alleged four prison priors (§ 667.5, subd. (b)). In a bifurcated proceeding, the court found one of the prison priors true.[2] The court sentenced defendant to three years in state prison and

[1] All further statutory references are to the Penal Code, unless otherwise stated.

[2] The prosecution dismissed one of the prison prior allegations. In the bifurcated proceeding, the court merged two of the remaining prison priors into one and found that allegation true, but found the remaining prison prior allegation not true.

ordered defendant to pay a $1,200 restitution fund fine (§ 1202.4). The prison sentence consisted of the two-year, middle term on the unauthorized driving count, plus one year for the prison prior, with the sentence on the receiving stolen property count stayed pursuant to section 654. On the misdemeanor counts, defendant received credit for time served.

On appeal, defendant contends: (1) that the court violated his due process rights by instructing the jury on a new theory of culpability after the case was submitted to the jury; (2) that the court erred by failing to instruct the jury on the defense of innocent intent; (3) that the court erred when it refused defendant's request for a pinpoint instruction on withholding and concealing stolen property; (4) that the court erred in instructing the jury pursuant to CALCRIM No. 376 that only slight evidence was required in addition to defendant's possession of stolen property; and (5) that the court erred in imposing a $1,200 restitution fine. We accept the Attorney General's concession that the restitution fine must be reduced to $600, but reject defendant's remaining claims of error. We order the court to modify the judgment to reduce the restitution fine and the corresponding parole revocation restitution fine and, as so modified, affirm the judgment.

FACTS

I. Prosecution Case

Jesus Fuentes testified that he owned a gray, 1989 Toyota Camry (Gray Camry). On May 14, 2006, Fuentes and his girlfriend went out of town for one night. Fuentes left the Gray Camry parked in front of his girlfriend's house in south San Jose. At that time, there was no damage to the interior of the car. However, there was a small crack in the windshield and the left rear passenger window was missing.

When Fuentes returned, the car was gone. Fuentes called the police to report that the car had been stolen and learned that the police had already recovered it. When

Fuentes got the Gray Camry back, he observed the following damage: (1) the seat belts had been cut; (2) the radio/stereo was gone and wires were hanging out of the space where it had been installed; (3) the front passenger seat had been slashed with a knife; and (4) the car would not start because the ignition had been "smashed in." Fuentes testified that he had never met defendant and did not give defendant or anyone else permission to use the Gray Camry.

Santa Clara County Sheriff's Deputy Jeffrey Puente testified that he was on patrol in a residential area of Gilroy at 12:26 a.m. on May 15, 2006, when he saw the Gray Camry coming toward him in the opposite traffic lane. Deputy Puente noticed that the Gray Camry's windshield was cracked, which is a violation of the Vehicle Code, and initiated a traffic stop. Deputy Puente gave the vehicle license number to county communications, but the dispatcher had not yet received information that the car had been stolen.

The Gray Camry pulled over immediately. Deputy Puente approached the car from the passenger side and noticed four people in the car. Defendant, who was 40 years old at the time, was driving. The passengers were K.F., a 17-year-old boy; J.G., a 16-year-old girl; and Laron Sisk, a 20-year-old male. As he spoke to the occupants of the car, the deputy noticed that the radio was missing, that there were wires coming out of the dash in the space where the radio had been, and that there was a pair of scissors in the ignition.

Deputy Puente asked defendant for his license and registration. Initially, defendant said that he had forgotten his license at home and that there was no registration in the car. Defendant told the deputy his name was Charles Wilson and gave a false date of birth. The deputy suspected he had stopped a stolen car that had not yet been reported stolen and requested back-up.

Deputy Puente asked the dispatcher to run the name and date of birth that defendant had given him and to obtain registration information on the car. The

dispatcher was unable to find a driver's license for a Charles Wilson with the date of birth defendant provided. Later, defendant told the deputy he did not have a license and gave him his true name, Stacy Hall. The deputy arrested defendant for driving without a license and giving a false name to a peace officer. Defendant was arrested a second time, a year later, on the felony charges in this case.

II. Defense Case

Defendant testified that he wrote software, that he was self-employed as a free-lance webmaster, and that he worked from his home in south San Jose. Defendant did not have a driver's license and had not owned a car in over 20 years.

Defendant testified that he did not steal the car. While walking home from a friend's house between 10:30 and 11:00 p.m. on the night of the incident, he saw the Gray Camry parked in front of his home. Defendant recognized the driver as 17-year-old K.F. Defendant had met K.F. at the home of some friends who had teenaged children. As defendant approached the car, he noticed that the engine was running and that K.F. had a male passenger, Sisk. Defendant smelled a faint scent of alcohol, noticed that K.F.'s speech was slurred, and asked him whether he had been drinking. Both boys said they had been drinking "a lot." Defendant determined that K.F. and Sisk were too intoxicated to drive, decided that it would be best if he (defendant) drove the car, and persuaded K.F. to let him drive.

Defendant testified that the engine was running the entire time he spoke to the boys. He stated that he "did not notice a key in the ignition, and [that he] did mention there was no key in the ignition." K.F. moved into the front passenger seat, Sisk got in the back seat, and defendant started driving the car. Defendant drove to a nearby movie theater and picked up K.F.'s girlfriend, J.G. He asked the passengers where they wanted to go and they said Gilroy.

Defendant drove to Gilroy. He testified that the deputy's testimony regarding the traffic stop was correct and that he had trouble shutting the engine off after he pulled over because he did not have a key. Defendant asked K.F. for a key. K.F. opened the "compartment in between the two seats," grabbed a pair of scissors, stuck them into the ignition, and turned off the engine. Defendant testified that he wore a seatbelt when he drove the car and did not notice anything wrong with the seat or the rear window. At the time of the incident, defendant believed the car belonged to K.F.; he did not find out until a year later, when he was arrested in Colorado, that the car did not belong to K.F.

On direct examination, defendant told the jury that he had been convicted of crimes when he was younger, "well over ten years ago," in Montana. He was last convicted of a crime in 1996. He told the jury that he has never stolen a car and that he has never been charged with or convicted of stealing a car.

On cross-examination, defendant testified that "Charles Wilson" is his software "pseudo name," that it is a common business practice to work under a pseudonym, and that there is nothing illegal about using a pseudonym. Defendant also uses the names Aaron Fritz and Chad Choate. He said he uses pseudonyms because his real name, Stacy Hall, is embarrassing. The prosecutor asked defendant whether he was embarrassed to use his real name because he has been an escapee from prison since 1996. Defendant responded that he was not an escapee, that the "current escape charge" was "dismissed long ago," that he had challenged the charge, and that he was waiting for a governor's warrant from Montana. Defendant also testified that he did not complete his last sentence from Montana, that he was illegally transferred to a facility in Texas, and that believing he was illegally detained, he climbed over a fence and left. Since then, he has lived for many years in solitude in San Jose.

On further cross-examination, defendant told the jury that, in 1996, he was convicted of burglary, attempted burglary, and criminal mischief arising out of one event. He was also convicted of escape in 1996. When the prosecutor asked defendant about his

convictions from 1990, defendant responded that he went through "a very troubling time . . . , a time of poverty" in his 20's and committed commercial burglaries. He could not recall the nature of his convictions in 1990, even after the prosecutor attempted to refresh his recollection with his "prison packet" from Montana. The parties subsequently stipulated that defendant was convicted of burglary, theft, and criminal mischief in Montana in 1990.

When asked why he drove the teenagers around, rather than take them home, defendant responded that K.F. was very persistent about going to Gilroy. Defendant also stated that his "personality is pretty much to do stupid things and volunteer," to help in the neighborhood if there is a need. As it turns out, J.G. lived in Gilroy.

III. Prosecution's Rebuttal Evidence

Deputy Puente testified that none of the occupants of the car smelled like alcohol or appeared to be drunk in any way. Defendant did not tell the deputy that he was driving because K.F. appeared to be drunk or that he did not know about the scissors in the ignition until K.F. put them there. Instead, defendant told the deputy that they used the scissors to start the car because they did not have a key, that the radio had always been missing, and that the Gray Camry belonged to a friend whose name defendant could not recall.

DISCUSSION

I. Contentions on Appeal

Defendant claims four forms of instructional error and that the court erred in imposing a $1,200 restitution fine.

First, defendant argues that his felony convictions for both unauthorized use of a vehicle and receiving stolen property must be reversed because the court violated his due

process rights by instructing the jury on an entirely new theory of culpability on the receiving stolen property count in response to a jury question after the case was submitted to the jury. In particular, defendant contends that the court erred when it instructed the jury on the alternate theories of withholding and concealing stolen property in response to the jury's question. Anticipating the Attorney General's argument that defendant waived this claim by failing to object in the trial court, defendant argues that the issue was preserved for appeal and that, if it was not preserved, then his counsel was ineffective for failing to make a proper objection. The Attorney General argues that the court responded properly to the jury's question, that its response did not present a new theory of guilt, and that there was no instructional error.

Second, defendant contends that his convictions for both unauthorized use of a vehicle and receiving stolen property must be reversed because the court violated his due process rights when it refused to instruct on the defense of innocent intent. The Attorney General argues that defendant did not request an instruction on these defenses, that there is no evidence of innocent intent, and that any error was harmless.

Third, defendant contends the court erred when it refused his request for a pinpoint instruction that the defendant is allowed a reasonable time after the defendant learns that property has been stolen to return it to the owner or turn it over to authorities.

Fourth, defendant argues that his convictions for both unauthorized use of a vehicle and receiving stolen property must be reversed because the court's instruction pursuant to CALCRIM No. 376 that, in addition to evidence that defendant knew he possessed property and evidence that the property had been recently stolen, only slight supporting evidence was required to prove guilt undermined the reasonable doubt standard. Defendant contends that we are required to address this issue in spite of his failure to object below, because the challenged instruction affects his substantial rights. The Attorney General argues that the court properly instructed the jury with CALCRIM No. 376.

Finally, defendant contends that the court erred in imposing a restitution fine of $1,200. He argues that since his sentence on the receiving stolen property count was stayed, the fine should have been $600. The Attorney General concedes that the restitution fine must be reduced to $600.

II. Instructing on Withholding or Concealing Stolen Property After Case Was Submitted to the Jury

A. Background

Count 2 of the information charged that "[o]n or about May 15, 2006, . . . the crime of BUYING OR RECEIVING A STOLEN MOTOR VEHICLE, . . . , in violation of . . . SECTION 496d, a Felony, was committed by [defendant] who did buy, receive, *conceal, withhold,* and sell a motor vehicle, a 1989 Toyota Camry, that had been stolen, knowing the property to have been stolen." (Italics added.)

Defendant contends that "as the case went to trial, it became clear that the prosecution's theory of the case was receiving only – not concealing or withholding." The Attorney General does not respond to this contention directly but argues that the "only factual issue was whether [defendant] knew it was stolen while he was in possession of the car," implying that the prosecution relied on all three theories. During argument, the prosecutor referred to the second count as "possession of stolen property" and argued, "So the defendant is charged with possession, merely possessing of the car. The defendant received or concealed, in other words, he had possession of the car, and he knew it was stolen." Thus it appears he relied on both theories.

After the presentation of evidence was completed, but before argument, the court instructed the jury with a version of CALCRIM No. 1750 as follows: "The defendant is charged in Count Two with receiving stolen property. [¶] To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant received property that had been stolen; AND 2. When the defendant received the property, he knew that the

property had been stolen. [¶] Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [¶] To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough. Two or more people can possess the property at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it, either personally or through another person." The instruction did not specifically mention the alternate theories of concealing or withholding stolen property that were charged in the information.

Prior to instructing the jury and outside the presence of the jury, the court stated that it had conferred with both counsel regarding the jury instructions "in several sessions" and that the jury instructions were in "their final incarnation." The "jury instruction conference[s]" were not reported. However, before instructing the jury, the court made a record that neither the prosecutor nor defense counsel had "any objections to any of the instructions that [were] being given" and that neither party had any proposed instructions that the court refused to give.

Defendant argued that he was not guilty of either felony offense because (1) he received consent to drive the car from the person who he thought was the rightful owner and (2) he did not know the car was stolen. Defense counsel told the jury, "What really caused the police officer to think the car was stolen, it was . . . when he saw the scissors in the ignition. And I agree, that – it's huge. If it had been there at the very beginning my client would have no defense. He would have definitely been given enough knowledge to know that particular car was stolen." Defense counsel argued that what defendant saw that night was a teenager driving an old car, the kind of car that is "normally owned by people that don't have a lot of money. It's their first car," and the fact that the car's windshield was cracked, the car's stereo was missing, and the car was running without a key was insufficient to indicate that it had been stolen. Defense

counsel argued, "how many times have we seen cars that they have no ignition keys? . . . [¶] . . . [¶] I'm pretty sure it's common knowledge."

One hour and 18 minutes after the jury started deliberating, it sent a note to the court with the following question: "Regarding count two, in the instructions, section 1750, point #2, is the phrase, 'when the defendant received the property . . .' to mean when the defendant first took possession of the property or at any time during his possession?"

The court and counsel discussed the jury's question outside the presence of the jury. The court summarized the inquiry as follows: "if he has possession and then discovers – assuming that is what the evidence establishes to their satisfaction – then discovers it's stolen and doesn't dispossess himself of it, is that sufficient?" Defense counsel stated that defendant did not become aware that the car was stolen until he saw the scissors and then had no chance to remove himself from the situation because the police were already there. Since it was close to the end of the day, the court decided to send the jury home and asked the jury to return the following afternoon, to give the court and counsel time to research the issue.

The following day, the court and counsel discussed their research efforts outside the presence of the jury. The court stated, "my research discovered the case of *People v. Johnson* at 233 Cal.App.2d 511 wherein it tells us that . . . receipt of stolen property is completed upon taking possession thereof. The defendant's knowledge at that time is what governs, and therefore, the answer to the jurors'[] question technically is yes, that it's when he first takes possession of the property. However, . . . [section] 496 proscribes not only receiving but also concealing and withholding property, which is . . . charged in the Information, should have been included in [CALCRIM No.] 1750 for which the court takes the rap for failing to do so." The judge then explained how the Judicial Council computer program he used would not allow him to include both receiving and concealing/withholding in the form instruction. The court stated that after discussing the

matter with counsel, they had agreed that the court would revise the instruction based on CALCRIM No. 1750. The court proposed giving the following revised version of CALCRIM No. 1750 (we have italicized the additions to the original instruction): "The defendant is charged in Count Two with receiving, *concealing or withholding* stolen property. [¶] To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant received, *concealed or withheld* property that had been stolen; AND 2. When the defendant received, *concealed or withheld* the property, he knew that the property had been stolen." The court did not make any changes to the definitions of the word "stolen" or the phrase "receive property" in the original instruction.

The court also stated that it would explain to the jury that "the allegation of conceal or withhold may apply to one who innocently acquires the property but *later* learns that it was stolen and thereafter conceals or withholds it. I will tell them and remind them . . . that when I am reading them the law I am not commenting or expressing any opinion as to what they find the facts to be. So I don't want to be suggesting to them [that] there is any factual deficiency in the receiving allegation or that there's any factual strength in the concealing or withholding. I want to be extremely neutral and will just explain that I am not expressing any opinion as to the facts." (Italics added.) Both counsel stated on the record that they were satisfied with the procedure outlined by the court.

Although defense counsel was satisfied with the proposed instruction, defendant objected and asked the court to insert the word "reasonable" in place of the word "later" in its explanation of the instruction to the jury to allow for a reasonable time for the defendant to surrender the stolen property after learning that it was stolen. The court responded, "Well, I'm not sure what reasonably means there." Defendant asked the judge to assume he had given him a Rolex watch and sometime during the first day the judge possessed the watch, he learned that it may be stolen and suggested the judge should be given a reasonable time to surrender it. The court responded, "If you've

learned it may be stolen I don't think that's guilt. This says that you learned it was stolen, not maybe [*sic*], and that you or the subject concealed it or withheld it. That's what the jury has to decide. [¶] . . . [¶] Not whether you were reasonable or not reasonable. It's whether you knew it was stolen, when you knew it was stolen, and what you did thereafter. That's what I am telling them. Okay?" Defendant responded, "Okay."

The court told the jury that its "extremely perceptive question" caused the court to recognize that its instruction was incomplete. The court explained that although section 496 is "generically known as receiving stolen property," the information charged receiving, concealing, or withholding, buying or selling stolen property, and that the original instruction "only instructed you on the allegation of receiving. I am now going to be advising you regarding receiving, concealing, and withholding; and you are to disregard the former 1750." The court then read the jury the revised instruction based on CALCRIM No. 1750 set forth above.

The court also told the jury, "The answer to your question is: The phrase [']when the defendant received the property['] means when the defendant first took possession of the property. Further in answer to the question and the new instruction the allegation of conceal or withhold may apply to one who innocently acquires property but *later*[3] learns that it is stolen and thereafter conceals or withholds it. [¶] Again, I am not suggesting to you in any way what you should or should not find the facts to be. These are the different concepts of law for your consideration." (Italics added.) The court apologized for the "incomplete instruction" the day before and asked the jury to continue its deliberations. The jury deliberated for an additional 24 minutes and returned its verdicts.

[3] Defendant had proposed inserting the word "reasonable" in place of the word "later" in this portion of the court's comments to the jury.

B. Forfeiture

The Attorney General argues that because defense counsel agreed with the court's response to the jury's question and neither defendant nor defense counsel objected on the ground raised on appeal, defendant forfeited his claim that the court violated his due process rights by instructing the jury on a new theory of culpability in response to the jury's question. The Attorney General acknowledges that defendant objected to the wording of the proposed instruction but argues that neither defendant nor defense counsel objected on the grounds raised on appeal, namely that the court was providing the jury with a new theory of culpability or that the revised instruction constituted unfair surprise.

Defendant contends that his request that the instruction be modified to state that a person who obtains property without knowing it is stolen be allowed a reasonable time after discovering it was stolen to return it to its owner or the authorities was sufficient to preserve the issue for appeal. He also contends that if the issue was not preserved for appeal, then his counsel was ineffective for failing to object.

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012, citing *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) In addition, we may review a claim of instructional error that affects the defendant's "substantial rights," with or without a trial objection. (§ 1259.) "Although section 1259 allows us to review—even in the absence of an objection—instructional error that affects substantial rights, the trial court's decision to give [the revised version of CALCRIM No. 1750] was not erroneous in any of the usual senses of being legally incorrect, misleading, or unrelated to the facts of the case." (*People v. Dennis* (1998) 17 Cal.4th 468, 534-535 (*Dennis*).)

In the trial court, defendant did not object to instructing the jury on the concealing and withholding theories, instead, he objected to the wording of the court's answer to the jury's question, arguing that the court should insert the word "reasonable." Accordingly, from this particular record we can infer that defendant was in agreement with the giving of an instruction on withholding or concealing stolen property. As a result, appellant has forfeited this claim of instructional error. (*People v. Bolin* (1998) 18 Cal.4th 297, 326 [forfeiture found where defense counsel agreed to giving of instruction and raised no objection]; *People v. Stone* (2008) 160 Cal.App.4th 323, 331.)

Defendant argues that by giving the revised CALCRIM No. 1750 instruction, the court violated his right to due process because he was not allowed to argue the new theory of culpability to the jury and that giving the revised instruction amounted to unfair surprise. In our view, defendant's trial court objection that the revised instruction did not include a reasonableness requirement was not sufficient to preserve these issues. Moreover, defendant does not argue that the challenged instruction was legally incorrect, misleading, or unrelated to the facts of the case. Thus, applying the rules set forth above, it appears he has forfeited any claim of instructional error.

Although defendant sets forth his claim as a form of instructional error, he argues unfair surprise. "[T]he long-established general rule is that a claim of unfair surprise at trial may not be raised for the first time after the verdict. [Citation.] The rule applies generally to criminal cases and prevents counsel from speculating on a favorable verdict once a situation arises that might constitute legal surprise. [Citation.] Counsel must act at the earliest possible moment after discovering the surprise, because counsel waives the ground by failing to make it known to the court through a motion for mistrial or for a continuance." (*Dennis, supra,* 17 Cal.4th at p. 534 [claim of unfair surprise after instructing the jury with CALJIC No. 2.10].)

As in *Dennis*, "defendant took none of the steps expected of a party who desires to claim unfair surprise, nor did he ask to reopen the case." (*Dennis, supra,* 17 Cal.4th at

p. 534.) After the court instructed the jury on withholding and concealing, neither defendant nor his attorney objected that the court was providing the jury with a new theory of culpability or that the instruction constituted unfair surprise. Defendant did not ask for an opportunity to present additional evidence or to reopen argument. He did not move for a mistrial or request a continuance to address the issues presented by the revised instruction. To the contrary, defense counsel approved the procedure proposed by the court. We therefore conclude that defendant has forfeited any claim of error related to the court's decision to instruct the jury with the revised version of CALCRIM No. 1750.

C. Ineffective Assistance of Counsel

Since defendant claims his counsel was ineffective for failing to object on the grounds of unfair surprise or for failing to request an opportunity to reopen argument below, we shall reach the merits of his contentions indirectly through his claim of ineffective assistance of counsel.

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*).)

" 'Tactical errors are generally not deemed reversible; and counsel's decision-making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' "

(*People v. Hart* (1999) 20 Cal.4th 546, 623-624.) " 'Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*Id*. at p. 624.)

Section 1138 provides in relevant part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . ." Section 1138 "imposes a 'mandatory' duty [on the court] to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, superceded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 690-691.) "[I]t is important jurors understand legal concepts they are applying and, if they indicate some confusion, that they be reinstructed appropriately." (*People v. Cordero* (1989) 216 Cal.App.3d 275, 282.)

In our view, defense counsel's performance was not deficient when he failed to object on the grounds of surprise to the revised instruction. The first amended information alleged that defendant committed "the crime of . . . RECEIVING A STOLEN MOTOR VEHICLE, . . . , in violation of . . . SECTION 496d" when he "did buy, receive, *conceal*, *withhold*, and sell a motor vehicle, a 1989 Toyota Camry, that had been stolen, knowing the property to have been stolen." (Italics added.) Before the evidentiary phase of the trial, the court read the charge to the jury, repeating these various theories of culpability. Although defendant argues on appeal that the prosecution did not rely on or argue withholding or concealing of stolen property, the record belies that assertion. During argument, the prosecutor referred to the crime generally as "possession of stolen property" and argued: "So the defendant is charged with possession, merely possessing of the car. The defendant received or *concealed*, in other words, he had possession of the car, and he knew it was stolen." (Italics added.)

In argument, defense counsel told the jury that defendant was relying on two defenses: (1) that defendant thought K.F. owned the car and received consent from K.F. to drive it; and (2) that defendant did not know the car was stolen. Although he stated that if defendant had seen the scissors in the ignition at the outset, he would have no defense, he argued that the condition of the old car, including the absence of a key, was not enough to put him on notice that the car was stolen.

In discussions with the court about the jury's question, outside the presence of the jury, defense counsel disagreed with the prosecutor's assertion that it would be ridiculous to argue that defendant did not know the car was stolen when he first received it and only realized it was stolen later. Defense counsel continued: "The officer sees the scissors and that's our defense. He barely least became aware at that time that the car was stolen. There was no scissors in the ignition key when it started. He had no chance to remove himself. He was already under the police – the police was there. So I think to imply anytime it might be just from the point the police – the car was stopped and then the police arrives, you know, there's a few seconds." Defendant had not argued this point to the jury and when the parties returned the next day to address the jury's question, defense counsel did not ask the court to reopen argument so that he could argue that defendant first realized the car was stolen when he was stopped by the police and that he did not have time to withhold or conceal.

From this record, we conclude that although defense counsel acknowledged that one might dispute withholding or concealing on the facts of this case, defendant intended to rely on the argument that he did not know that the car was stolen prior to his arrest in Colorado. In our view, this was a tactical decision and not deficient performance by counsel that merits reversal.

Defendant's reliance on *People v. Jennings* (1972) 22 Cal.App.3d 945 (*Jennings*) and *People v. Garnett* (1866) 29 Cal. 622 (*Garnett*) is misplaced.

The defendant in *Jennings* was charged with multiple counts of assault with intent to commit murder (§ 217). At trial, the court refused the defendant's instruction on simple assault, agreed with the defendant's objections to charging assault with a deadly weapon (§ 245) because of penalty issues, and instructed the jury only on assault with intent to commit murder. The jury asked for further instructions three times; the third time it advised the court it was having trouble reaching a unanimous verdict on the issue of intent to murder. Over the defendant's objection, the court instructed the jury on simple assault and assault with a deadly weapon as lesser included offenses. The jury promptly found the defendant guilty of assault with a deadly weapon. (*Jennings, supra,* 22 Cal.App.3d at pp. 947-948.) The appellate court reversed and held that giving the new instructions when the jury was deadlocked might have been taken by the jury as an invitation to arrive at some sort of guilty verdict and, given the timing, interfered with the defendant's right to a fair trial. (*Id.* at pp. 948-949.) The instant case is factually distinguishable, since the jury sought clarification after deliberating for a short time and did not indicate that it was deadlocked.

The defendant in *Garnett* was charged with burglary and grand larceny, but was only tried for burglary. The jury was instructed on burglary but not grand larceny. After the jury was out for three hours without reaching a verdict and without any request or question from the jury, the court, on its own motion and over defense objection, instructed the jury that the defendant had also been charged with grand larceny and that the jurors might find him guilty of grand larceny. Immediately thereafter, the jury found the defendant guilty of grand larceny. (*Garnett*, *supra*, 29 Cal. at pp. 626-628.) The California Supreme Court concluded that the defendant had been tried for one offense (burglary) and found guilty of another (grand larceny). The court observed that the jurors were not told that if the evidence did not support the burglary charge, then they "might inquire whether it sustained the charge of larceny." (*Id.* at p. 627.) Instead, they were told that if the evidence did not support the burglary charge, then they should find the

defendant not guilty. The court held that "so sudden a shifting of the issue, without time for further argument" prejudiced the defendant. (*Id.* at p. 628.) This case is distinguishable, since the court here was responding to a jury question, defense counsel approved the court's response to the question, and there was some discussion during trial of withholding or concealing.

For these reasons, we conclude that defense counsel was not ineffective for failing to object to the court's further instruction on withholding and concealing stolen property on the grounds of surprise or for failing to ask the court to reopen argument after instructing the jury with the revised version of CALCRIM No. 1750.

III. Failure to Instruct Sua Sponte on Defense of Innocent Intent

Defendant contends that the court erred when it failed to instruct the jury sua sponte on the innocent intent defense to possession of stolen property.

A. Standard of Review

Errors in jury instructions are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

B. Trial Court's Duty to Instruct Sua Sponte on Innocent Intent

People v. Breverman (1998) 19 Cal.4th 142 (*Breverman*) recited the rules governing sua sponte instructions. " ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." ' " (*Id.* at p. 154,

quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715 (*Sedeno*).)[4] "The duty to instruct, *sua sponte*, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses, . . . , and on the relationship of these defenses to the elements of the charged offense." (*Sedeno*, at p. 716.) "In *Sedeno*, . . . , [the California Supreme Court] noted that the sua sponte duty to instruct on all material issues presented by the evidence extends to *defenses* as well as to lesser included *offenses* [citation], but [the Supreme Court] drew a sharp distinction between the two situations. In the case of *defenses*, [it] concluded, a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' ([Citation,] italics added.) Thus, when the trial court believes 'there is substantial evidence that would support a *defense* inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.' " (*Breverman, supra*, 19 Cal.4th at p. 157, citing *Sedeno*, at pp. 716, 717, fn. 7.) But there is no sua sponte duty to instruct on a defense if the evidence of that defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.)

In the case of "pertinent matters falling outside the definition of a 'general principle of law governing the case,' it is 'defendant's obligation to request any clarifying or amplifying instruction.' " (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

C. Innocent Intent Defense

Innocent intent is a defense to a charge of receiving, concealing or withholding stolen property in violation of section 496. (*People v. Reyes* (1997) 52 Cal.App.4th 975,

[4] *Sedeno* was disapproved of on other grounds in *Breverman, supra*, 19 Cal.4th at page 149 and *People v. Flannel* (1979) 25 Cal.3d 668, 684, footnote 12.

985.) "It has been held that '[u]nder present section 496, while a specific fraudulent intent by the perpetrator (e.g., for his [or her] own gain or to prevent the owner from again possessing [the] property) is not an element of the crime which the prosecution must prove, the absence of any such guilty intent is a defense which, if established, disproves the charge." (*Ibid*., citing *People v. Osborne* (1978) 77 Cal.App.3d 472, 476 (*Osborne*).) "[T]he mere receipt of stolen goods with knowledge they have been stolen is not itself a crime if the property was received with intent to restore it to the owner without reward or with any other innocent intent [citation]. The critical factor is the defendant's intent at the time he receives or initially conceals the stolen property from the owner. The intent to restore must exist at the moment the stolen property is accepted by the receiver if he is to be acquitted. If the defendant received or concealed stolen property with general criminal intent to aid the thief, or to deprive the owner of possession, or renders more difficult a discovery by the owner, or to collect a reward, he possesses the requisite wrongful intent, and it is no defense that he *subsequently* intended to return the stolen property to the owner." (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 (*Wielograf*).) The law does not require an instruction on innocent intent "whenever a defendant disclaims guilty intent. Otherwise, it would be mandatory almost without exception whenever a defendant denied the charges. In the few instances where such an instruction is warranted, it must of necessity turn on the particular factual situation before the court." (*Id*. at p. 495.) The burden is on the defendant to introduce evidence that his or her possession of stolen property was accompanied by an innocent intent. (*People v. Dishman* (1982) 128 Cal.App.3d 717, 721.)

In *Osborne*, an undercover officer sold the defendant, a shop owner, some jewelry. The officer told the defendant that the jewelry had been stolen when, in fact, it had not been stolen. The police arrested the defendant immediately after he paid for and took possession of the jewelry. (*Osborne*, *supra*, 77 Cal.App.3d at p. 474.) At trial, the defendant testified he took the property with the intent of arresting the suspected thief.

(*Id*. at p. 475.) On appeal, the court held that "the *innocent intent* of returning the property to the true owner is a defense to the charge of attempted receiving of stolen property." (*Id*. at p. 476.) With regard to the trial court's duty to instruct on the defense, the appellate court stated: " '[T]he trial court is not required to anticipate every possible theory that may fit the facts or fill in every time a litigant or his counsel fails to discover some obscure but possible theory of the facts. . . . "There must be *substantial* evidence on the issue sufficient to alert the trial judge that it is an issue in the case. There is no duty on the trial court to dissect the evidence in an effort to develop some arcane, remote or nebulous theory of the evidence on which to instruct." ' " (*Id*. at p. 478.) Applying the criteria set forth in *Sedeno* regarding the trial court's duty to instruct on defenses, the *Osborne* court concluded that the defense of innocent intent to turn thief and property over to police was not inconsistent with the defense of entrapment presented at trial and that there was substantial evidence to support innocent intent instructions, and held that under the circumstances of that case, the court had a sua sponte duty to instruct the jury on innocent intent. (*Id.* at pp. 477-478.)

In *Wielograf*, two friends of the defendant stole a fully restored 1929 Model A Ford. Suspecting the car was stolen, the defendant suggested they put it in his garage "to protect the car and to keep his friends out of trouble." (*Wielograf, supra*, 101 Cal.App.3d at p. 491.) After the two friends told the defendant the car was stolen, he agreed to store it for them indefinitely. Over the next five days, the defendant and his friends had several meetings, in which they discussed various ideas about what to do with the car, including keeping it, finding a buyer, and disassembling it for parts. Ultimately, they pushed it into the street and reported its location to the police to collect a reward. (*Id.* at p. 491.) The court distinguished *Osborne* and found no duty to instruct on innocent intent, stating: "the facts are wholly inconsistent with the defendant's protestations at trial of worthy motives and righteous intents. He had ample time and opportunity to execute his guiltless 'intents.' " (*Id.* at p. 495.)

D. Analysis

As the court stated in *Wielograf*, an instruction on intent to return stolen property is not required "whenever a defendant disclaims guilty intent." (*Wielograf, supra*, 101 Cal.App.3d at p. 495.) Where such an instruction is warranted there must be substantial evidence that, from the moment the defendant initially received or concealed the property, he intended to return it and, if time allowed, he immediately took steps to return the property rather than simply retaining possession of it. A simple protestation of innocent intent by the receiver is not sufficient. (*Id*. at pp. 494-495.)

As noted above, the trial court has a sua sponte duty to instruct on a defense " 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*Breverman, supra*, 19 Cal.4th at p. 157.) In this case, as in *Wielograf*, there was insufficient evidence to support giving an instruction on innocent intent. Defendant never testified that upon discovering that the car was stolen, he intended to return the car to its rightful owner or turn it in to the police. Although he stated that he did not see the scissors in the ignition until after he was pulled over by the police, he did not state that he first realized the car was stolen at that time or that he formed the intent to return the property at that time. Defendant testified that he believed the car belonged to K.F. and that he did not find out that the car did not belong to K.F. until a year after the incident when he was arrested for the felony offenses in this case in Colorado. Thus, his defense was that he did not know the car was stolen on the night of the incident. Moreover, the claim of innocent intent was inconsistent with that defense. To claim innocent intent, the defendant must know that the property was stolen and form the intent to turn it in to the police or return it to its owner. In this case, there was no evidence that supported a defense of innocent intent and the defense was inconsistent

with defendant's theory of the case. For these reasons, we conclude that the court did not have a sua sponte duty to instruct on innocent intent.

IV. Trial Court's Refusal to Give Pinpoint Instruction

Defendant argues that the trial court erred when it refused his request for a pinpoint instruction that "a defendant who innocently obtains property but then later finds out it is stolen should have a 'reasonable amount of time to surrender' the object to its lawful owner or authorities." On appeal, he contends he had no opportunity to conceal or withhold the property because by the time he realized the property was stolen, he had already been detained by the police.

"A criminal defendant is entitled, on request, to a[n] instruction 'pinpointing' the theory of his defense." (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) "[H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' " (*People v. Wharton*, at p. 570.)

We begin by noting that neither defendant nor his counsel provided the court with a written pinpoint instruction relating to this issue. Instead, while discussing the court's proposal for addressing the jury's question about CALCRIM No. 1750 and the proposed revision to that instruction, defendant suggested that the court insert the word "reasonable" in place of the word "later" in its comments to the jury about the revised CALCRIM No. 1750 instruction. The court declined to do so. As noted previously, after reading the jury the revised version of CALCRIM No. 1750, the court repeated the jury's

question and stated, "The answer to your question is: The phrase [']when the defendant received the property[']means when the defendant first took possession of the property. Further in answer to the question and the new instruction the allegation of conceal or withhold may apply to one who innocently acquires property but *later*[5] learns that it is stolen and thereafter conceals or withholds it. [¶] Again, I am not suggesting to you in any way what you should or should not find the facts to be. These are the different concepts of law for your consideration." (Italics added.)

Defendant did not testify that he first realized the car was stolen when K.F. placed the scissors in the ignition. He said he believed the car belonged to K.F. and did not know the car did not belong to K.F. until a year later. He also testified that he did not see the scissors until he was pulled over by the police and asked K.F. how to shut the engine off. Moreover, defendant did not tell Deputy Puente that he did not know the car was stolen until K.F. placed the scissors in the ignition. Instead, he told the officer he got the car from a friend but he did not know the friend's name. He also told the deputy the car did not have a key and that they used the scissors to start the car.

In closing argument, defense counsel told the jury that he was relying on two defenses: (1) that defendant received consent to drive the car from "the person he thought was the rightful owner of the car" and (2) that defendant "had no knowledge that the car was stolen." Although defendant's closing argument suggested that he should have known the car was stolen when K.F. put the scissors in the ignition,[6] defendant also argued that the condition of the car, including the use of the scissors, was not enough to

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[5] As noted in footnote 3, defendant had proposed inserting the word "reasonable" in place of the word "later" in this portion of the court's comments to the jury.

[6] We refer here to defense counsel's argument that: "What really caused the police officer to think the car was stolen, it was . . . when he saw the scissors in the ignition. And I agree, that – it's huge. If it had been there at the very beginning my client would have no defense: He would definitely been given enough knowledge to know that particular car was stolen."

put him on notice that the car had been stolen. Neither the defense evidence nor defendant's argument supported a request for a pinpoint instruction that the defendant should be allowed a reasonable amount of time after discovering the property is stolen to surrender the property to its lawful owner or authorities.

Moreover, we are not persuaded that the modification that defendant requested is a correct statement of the law. Defendant does not cite or discuss any legal authority that supports his contention that one who innocently obtains property and then later finds out it is stolen should have a reasonable amount of time to surrender it to the police or return it to the owner. The cases on innocent intent do not support such a conclusion. As the court stated in *Wielograf*, "The critical factor is the defendant's intent at the time he receives or initially conceals the stolen property from the owner. The intent to restore must exist at the moment the stolen property is accepted by the receiver if he is to be acquitted." (*Wielograf, supra*, 101 Cal.App.3d at p. 494.) Defendant's contention that he be allowed a reasonable time to return or surrender the property is inconsistent with this authority. In addition, defendant did not present any evidence that he formed the intent to return or surrender the property immediately after K.F. put the scissors in the ignition. Defendant's conduct was, in fact, inconsistent with a claim of innocent intent. He did not tell the deputy that he just realized the car might be stolen. Instead, he gave a false name and told the deputy he had borrowed the car from a friend he could not name.

For these reasons, we hold that the trial court did not err when it refused defendant's request to add a reasonableness requirement to the revised CALCRIM No. 1750 instruction.

V. CALCRIM No. 376

Defendant contends the trial court violated his state and federal constitutional rights when it instructed the jury pursuant to CALCRIM No. 376 that "slight evidence," in addition to defendant's possession of recently stolen property, would support a guilty

verdict. Defendant contends the instruction undermined the reasonable doubt standard and reduced the prosecution's burden of proof. Defendant also asserts that the issue was not forfeited by his counsel's failure to object in the trial court.

The Attorney General argues that there was no instructional error.

A. Instruction at Issue

The trial court instructed the jury, without objection from defendant, with CALCRIM No. 376 as follows: "If you conclude that the defendant knew he possessed property and you conclude that the property had, in fact, been recently stolen, you may not convict the defendant of Unauthorized Use of a Vehicle or Possession of a Stolen Motor Vehicle with Knowledge based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed Unauthorized Use of a Vehicle or Possession of a Stolen Motor Vehicle with Knowledge. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstance tending to prove his guilt of Unauthorized Use of a Vehicle or Possession of a Stolen Motor Vehicle with Knowledge. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

B. Forfeiture

Although defendant did not object to the instruction at trial, "there is no forfeiture of an instructional issue on appeal where, as here, the issue asserts a violation of substantial constitutional rights." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574 (*O'Dell*) [CALCRIM No. 376]; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173

(*Barker*) [CALJIC No. 2.15, the predecessor to CALCRIM No. 376], both citing *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn. 7.)

C. Standard of Review

We independently review the legal adequacy of a jury instruction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.)

D. Propriety of Instructing With CALCRIM 376

CALCRIM No. 376, like its predecessor CALJIC No. 2.15, is based on a "longstanding rule of law which allows a jury to infer guilt of a theft-related crime from the fact a defendant is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances which tend to show guilt." (*Barker*, *supra*, 91 Cal.App.4th at p. 1173.)

In *Barnes v. United States* (1973) 412 U.S. 837, 843, the United States Supreme Court noted that "for centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." The court in *Barnes* found that such an inference comported with due process if "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. . . ." (*Ibid.*)

In California, CALJIC No. 2.15 evolved "from cases holding that proof of possession of recently stolen property is insufficient by itself to support a guilty verdict as to a theft-related offense. [Citations.] It is a permissive, cautionary instruction which inures to a criminal defendant's benefit by warning the jury not to infer guilt merely from a defendant's conscious possession of recently stolen goods, without at least some corroborating evidence tending to show the defendant's guilt. [Citations.] Such an inference of guilt has been held not to relieve the prosecution of its burden of establishing guilt beyond a reasonable doubt. [Citations.] The prosecutor's use of this permissive

inference comports with due process unless there is no rational way for the jury to make the logical connection which the presumption permits. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.)" (*Barker, supra,* at 91 Cal.App.4th at p. 1174.) The inference to be drawn from possession of stolen property " 'is applicable whether the crime charged is theft, burglary, or knowingly receiving stolen property.' " (*Ibid.*, citing *People v. McFarland* (1962) 58 Cal.2d 748, 755.) The language of CALCRIM No. 376 is very similar to the language of CALJIC No. 2.15.

Defendant's contention that the reference to "slight" evidence in CALCRIM No. 376 impermissibly diminished the prosecution's burden of proof was rejected by the appellate court in *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1225-1228 (*Snyder*) which discussed CALJIC No. 2.15. The *Snyder* court held that "CALJIC No. 2.15 does not create an improper presumption of guilt arising from the mere fact of possession of stolen property, or reduce the prosecution's burden of proof to a lesser standard than beyond a reasonable doubt. Rather, the instruction 'relates a contrary proposition: a burglary . . . may not be presumed from mere possession unless the commission of the offense is corroborated.' [Citation.] The inference permitted by CALJIC No. 2.15 is permissive, not mandatory. Because a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [it] therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.] Requiring only 'slight' corroborative evidence in support of a permissive inference, such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the accuser's right to due process unless the conclusion suggested is not one that reason or common sense could justify in light of the proven facts before the jury." (*Snyder*, at p. 1226.)

CALJIC No. 2.15, the predecessor to CALCRIM No. 376, has withstood numerous challenges in the appellate courts of this state on the grounds that it lessens the prosecution's burden of proof. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 248-

249; *People v. Holt* (1997) 15 Cal.4th 619, 676-677; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172-1174 (*Williams*) and cases cited there; *Snyder*, *supra*, 112 Cal.App.4th at pp. 1225-1229 and cases cited there.) More recently, the court in *O'Dell* rejected such a challenge to CALCRIM No. 376. (*O'Dell*, *supra*, 153 Cal.App.4th at pp. 1573-1577.)

Nevertheless, defendant insists that federal cases support his position, citing *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1255-1256; and *United States v. Partin* (5th Cir. 1977) 552 F.2d 621. We disagree. The cases defendant relies on dealt with a conspiracy instruction tied to the substantive element of a conspiracy charge. For example, in *Gray*, the jury was instructed on the elements of conspiracy and then told that "[t]he Government need only introduce slight evidence of a particular defendant's participation, once the conspiracy is established, but must establish beyond a reasonable doubt that each member had a knowing, special intent to join the conspiracy." (*Gray, supra,* 626 F.2d at p. 500.) The Fifth Circuit has consistently condemned that instruction, finding that it lowers the reasonable doubt standard. (*Ibid*.; *United States v. Brasseaux* (5th Cir. 1975) 509 F.2d 157, 161, fn. 5 and cases cited there.) Here, the issue was whether guilt may be inferred from the possession of recently stolen property. The federal cases are not analogous or persuasive.

As this court stated in *Williams*, "an inference of guilt may rationally arise from the concurrence of conscious possession and many other circumstances." (*Williams*, *supra,* 79 Cal.App.4th at p. 1173.) In our view, CALCRIM No. 376, like CALJIC No. 2.15 "correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence. As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a

verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process." (*Ibid.*) In addition, CALCRIM No. 376 reminded the jury of the prosecution's burden to prove its case beyond a reasonable doubt.

For these reasons, we conclude the trial court did not err when it instructed the jury with CALCRIM No. 376.

VI. Cumulative Effect of Alleged Instructional Error

Defendant argues that the "combined effect of the multiple instructional errors multiplied the prejudice." Since we find no instructional error, we reject this contention.

VII. Restitution Fine

Defendant contends that the restitution fine must be reduced from $1,200 to $600 because the court erroneously relied on a count that had been stayed pursuant to section 654 in calculating the amount of the fine. The Attorney General concedes that the restitution fine must be reduced to $600.

The court ordered a restitution fine of $1,200 "pursuant to the formula in [section] 1202.4(b)." Section 1202.4, subdivision (b) provides in relevant part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, . . . [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is

convicted." In this case, the court calculated the fine as the product of $200 multiplied by defendant's three-year prison sentence, multiplied by two felony counts, for a total of $1,200.

But if the court stays a felony sentence pursuant to section 654, as the court did with the receiving stolen property count in this case, that felony cannot be considered in calculating the amount of the fine under the formula in section 1202.4, subdivision (b)(2) because using the stayed count in this way violates the section 654 ban on multiple punishment. (*People v. Le* (2006) 136 Cal.App.4th 925, 932-934.) Applying the formula in section 1202.4, subdivision (b)(2) with this limitation in mind results in a restitution fine of $600 (the product of $200 multiplied by defendant's three-year prison sentence, multiplied by one felony count). We therefore accept the Attorney General's concession and agree that the restitution fine and the corresponding parole revocation restitution fine (§ 1202.45) must be reduced to $600.

DISPOSITION

The judgment is ordered modified to state that the amount of the restitution fine (§ 1202.4, subd. (b)) is $600 and the amount of the suspended parole revocation restitution fine (§ 1202.45) is $600. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment, setting forth these changes in the judgment, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

_____
McAdams, J.

WE CONCUR:

_____
Mihara, Acting P.J.

_____
Duffy, J.